

## FULL COMPARISON OF USACE § 404 PROGRAM TO STATE § 404 PROGRAM

The following compares the current USACE program to the potential state program.

Concept	USACE § 404 Program	State § 404 Program	Description of Change
<b>Jurisdictional Determination</b>			
<b><i>Jurisdictional Waters</i></b>	All WOTUS	WOTUS in Arizona except for USACE-retained § 10 waters and tribal waters	Identifies the waters under state jurisdiction; may change if EPA redefines WOTUS
<b><i>Preliminary JD (PJD)</i></b>	Waters with an ordinary high water mark or wetland features are presumed jurisdictional (no significant nexus evaluation necessary)	Determinations process will be the same (jurisdiction is presumed)	No change
<b><i>Approved JD (AJD)</i></b>	USACE jurisdiction (or lack thereof) over waters is documented and proven based on federal rule	Determination process will be the same	No change
<b><i>Appeals – Jurisdictional Determinations</i></b>	AJD is appealable; PJD is not appealable	AJD can be appealed to water quality appeals board by a person affected by the JD (e.g., landowner or leaseholder); PJD is not appealable	Appeals must conform to state appeals process

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<b>Timeframes – Jurisdictional Determinations</b>	<p>Average timeframe for PJDs: 73 calendar days (ranging from 2 – 6,030 calendar days)</p> <p>Average timeframe for AJDs: 148 calendar days (ranging from 9 - 3,502 calendar days)</p> <p>10 years of USACE data</p>	<p>Estimated timeframe for PJDs: 30 calendar days</p> <p>Estimated timeframe for AJDs: 45 calendar days</p>	Licensing timeframes will be established by rule
<b>Fees – Jurisdictional Determinations</b>	None	Fees will be charged for AJD and PJDs (see draft fee schedule)	Change from a no-fee to a flat fee based program
<b>Permit Process</b>			
<b>Exemptions, Applicability</b>	Certain activities related to normal farming, silviculture, and ranching are exempt from the CWA	Exemptions and BMPs to support those exemptions will be the same	No change
<b>Permit Types</b>	Regional general permits (RGP); Nationwide permits (NWP); Individual permits, including letters of permission, emergency permits, after-the-fact permits	Effectively carried forward  State general permits (to cover applicable activities under existing RGPs and NWPs), permit conditions modified to comply with state law, individual permits	RGPs and NWPs will be minimally modified and reissued as state general permits; specific modifications still under evaluation  No change to individual permits
<b>Public Notice and Participation – General Permit (GP)</b>	Public notice when GPs are renewed every five years; NEPA review occurs with each issuance	ADEQ will provide public notice of draft state general permits; no NEPA review	Public comment opportunity on issuances or renewals of general permits

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<b>Public Notice and Participation – Individual Permit (IP)</b>	<p>A public notice issued within 15 days of receipt of a complete application</p> <p>The public notice comment period is 15 to 30 days (depending upon nature of activity), and includes opportunity for public hearing</p>	<p>First public notice upon receipt of administratively complete application</p> <p>Second public notice of draft permit and technical support document, with opportunity for comment and to request a hearing</p>	Public will have a greater opportunity to engage in individual draft permit process under a state § 404 program
<b>Renewals/Extensions</b>	Renewals and extensions can be obtained upon written request	Effectively carried forward	No change
<b>Permit Duration</b>	Nationwide permit term – five years; individual permit term – typically five years	Per federal regulation, no state permit may be issued for longer than five years	<p>No change for general permits</p> <p>Individual permits will no longer be valid beyond five</p>
<b>Monitoring/Reporting/Recording</b>	Monitoring, reporting and recordkeeping to be required as needed to safeguard the aquatic environment, including notification upon completion of fill activities	Obligations to condition permits will be carried forward	ADEQ will condition permits as necessary to maintain compliance and to safeguard aquatic resources
<b>Timeframes – General Permits</b>	<p>Average timeframe for GPs: 80 days (ranging from 1 – 1,207 days)</p> <p>10 years of USACE data</p>	Estimated timeframe for GPs: 30 days	Licensing timeframes will be established by rule

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<b><i>Timeframes – Individual Permit</i></b>	<p>Average timeframe for IPs: 229 days (ranging from 23 – 1,588 days)</p> <p>5 years of USACE data</p> <p>Separate CWA § 401 state water quality certification is required</p>	<p>State water quality evaluation will be incorporated in permit review</p> <p>Projected 120 days from application to receipt of authorization with a goal of 180 days for all permits</p>	<p>Licensing timeframes will be established by rule</p> <p>Review timeframes will likely be shortened due to a streamlined individual permit review consistent with the CWA and state law</p>
<b><i>Fees – General Permit</i></b>	<p>None; program is federally funded</p>	<p>Proposed flat fee will be charged (see draft fee schedule)</p>	<p>Change from no fee to a flat fee</p>
<b><i>Fees – Individual Permit</i></b>	<p>\$10 for non-commercial activities</p> <p>\$100 for commercial activities; balance of program is federally funded</p>	<p>Hourly review and processing fees will be charged (see draft fee schedule)</p>	<p>Change to a fee-based program</p>

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<b>404(b)(1) Guidelines Implementation, minus compensatory mitigation</b>			
<b><i>Avoidance, Minimization, Alternatives Analysis, Significant Degradation, and other restrictions on discharge</i></b>	<p>Permitted activity must demonstrate avoidance, minimization, no significant degradation, and least environmentally damaging practicable alternative (LEDPA), as well as compliance with other discharge restrictions</p> <p>CWA § 401 certification used to ensure state water quality standards will not be violated</p>	<p>Carried forward</p> <p>State water quality evaluation will be evaluated as part of 404(b)(1) analysis</p>	No change

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<p><b><i>Endangered Species Act</i></b></p>	<p>Project must not cause jeopardy or adverse modification of critical habitat</p> <p>Triggers formal ESA § 7 consultation with USFWS if impacts to listed or proposed threatened or endangered species or to critical habitat would occur</p> <p>Informal consultation triggered with USFWS if a project may affect a listed species or critical habitat</p>	<p>Jeopardy and adverse modification limitations carried forward under Guidelines</p> <p>ESA continues to apply to permittee actions</p> <p>Obligations under the Guidelines are carried forward, which also consider effects to threatened and endangered species</p> <p>ADEQ will work with USFWS and AZGFD to develop informal consultation to reduce impacts to listed species</p> <p>Permits that are unavoidably “likely to adversely affect” species will be off-ramped permanently to the USACE to perform an ESA § 7 consultation and issue the permit, or the project proponent may obtain a § 10 incidental take permit and ADEQ will issue the 404 permit</p>	<p>ADEQ intends to provide an informal process to resolve or eliminate potential adverse impacts to listed species without ESA § 7, with an option for a transfer of the permitting action to USACE for formal ESA § 7 consultation and permitting if impacts unresolvable</p> <p>If necessary because of unavoidable adverse effects, ADEQ will either transfer permit to USACE for processing or applicant may obtain ESA § 10 permit</p>

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<b><i>Cultural and Historic Resources</i></b>	Impacts to register-eligible historic properties trigger consultation under NHPA § 106 and tribal consultation	<p>Review and comment by SHPO per A.R.S. § 41-863; if substantial adverse effects, ADEQ will initiate measures to ensure that timely steps are initiated to document cultural resources inside or outside of WOTUS</p> <p>If effects amount to significant degradation under the 404(b)(1) Guidelines, ADEQ will require additional minimization measures in the WOTUS</p> <p>ADEQ will consider tribal input regarding impacts to cultural and historic resources after consultation and will encourage permittees to incorporate tribal input in project plans</p>	Protections will be provided primarily through SHPA compliance and significant degradation review processes under the 404(b)(1) Guidelines
<b>Tribal Resource Protection</b>	Federal trust responsibility requirements for consultation ensures, to extent permitted by law, that tribal concerns and interests are considered whenever federal actions and/or decisions may affect Indian Country or other tribal interests	State law requires agencies to seek input from tribes before undertaking any action that has the potential to affect tribal resources, and incorporate such input into the agency's ultimate decision, to the extent the agency is authorized to do so	ADEQ intends to build upon and improve its consultation procedures

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<b>Public Interest Determination</b>	All USACE-issued permits undergo a public interest factor review before a permit is issued; permit conditions may be modified to avoid significant adverse effects on the public interest  Permits may be denied if they are not in the public interest	ADEQ will review similar factors under the 404(b)(1) Guidelines to protect public health and the environment	CWA 404 does not require public interest evaluations; ADEQ, therefore, may not require permit condition modifications as a result of a public interest review
<b>Compensatory Mitigation</b>			
<b>Interagency Review Team (IRT)</b>	The IRT reviews ILF enabling instruments, projects, and credit release schedule	Likely carried forward with the same membership in coordination with the USACE	Unchanged
<b>Mitigation Vehicles</b>	No mitigation banks in Arizona currently; an in-lieu fee program is an option, if available and within service area; permittee responsible mitigation is also an option	Carried forward	No substantial changes anticipated
<b>Mitigation Ratios</b>	Follows South Pacific Division standard operating procedures and checklists	Carried forward	Effectively unchanged
<b>Functional Assessment</b>	No quantitative functional assessment currently available in Arizona; qualitative assessment methods have been utilized by the USACE's Arizona Branch	Carried forward  Likely to negotiate with EPA to use a qualitative functional assessment method	Effectively unchanged
<b>Self-Monitoring/Reporting</b>	Required by 2008 mitigation rule	Carried forward	Effectively unchanged

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<b>EPA Oversight</b>	A USACE/EPA MOA allows for EPA review of and elevation of USACE permitting decisions, but EPA cannot prevent permit issuance, except to restrict discharge sites under 404(c)	EPA will have review and objection authority under the CWA and can prevent a permit from being issued if the permit does not meet CWA requirements, Guidelines, or state program regulation requirements	EPA may object to a state § 404 permit issuance if the permit does not comply with § 404 requirements
<b>Inspections</b>	Principally complaint-driven per USACE regulation	ADEQ will have an inspection program to comply with state program regulations	ADEQ will conduct regular inspections to ensure compliance  ADEQ will employ a full-time compliance and enforcement officer to perform inspections of permitted actions and unauthorized discharges
<b>Enforcement</b>	USACE is lead enforcement agency for § 404  EPA retains shared enforcement authority  Federal citizen suits can be filed against facilities	ADEQ will enforce § 404 of the CWA  EPA retains shared enforcement authority  Federal citizen suits can be filed against facilities	Effectively unchanged  ADEQ will employ staff to ensure CWA § 404 compliance through compliance assistance or enforcement actions, when necessary

## City of Phoenix ADEQ 404 Assumption Roadmap Survey Responses – Final September 25, 2019

### Survey Question #2: Selected “No”

#### *Explanation:*

The City of Phoenix holds a number of CWA Section 404 permits. As a local government, the City seeks to maximize the benefit to our residents from any expenditure of ratepayer or tax dollars. Currently, the City pays no permit fees (outside of any necessary compensatory mitigation negotiated as the result of a project) to the U.S. Army Corps of Engineers (USACE). This allows us to prioritize spending on projects that provide a direct benefit to our residents.

While we greatly value our working relationship with ADEQ, Phoenix does not believe that Section 404 assumption by the State would provide a benefit or value to the City, the State or the majority of regulated entities when compared to the current USACE program. As a specific response to this question, the fees proposed are extremely high and concern Phoenix from multiple perspectives:

1) Phoenix is concerned about these fees on behalf of our own projects. A quick glance at a few recent projects showed individual project costs could increase by between \$25,000 to over \$100,000. For some City departments, these fees could make the difference between being able to complete a project and having to postpone, reduce scope, or cancel the project. This would have a direct impact on the amenities and services the City can provide to our residents. For example, such fees could mean a trailhead parking area could not be extended to accommodate increased use of an area because funds wouldn't be able to cover both design/construction and 404 permitting costs. Phoenix has limited funds with which to provide a wide variety of services and amenities to our residents and high permitting fees inhibit our ability to respond to those needs. This is particularly true when we reflect that the USACE has been very successful in meeting our permitting and timeline needs without such fees.

2) Section 404 applies not just to big business but also to small business owners and even individual landowners. These smaller entities may require a JD and either a general permit or an individual permit, depending on the proposed activities and type of aquatic resource that will be impacted. However, the fees proposed by ADEQ would present a real barrier to land improvements or compliance with Section 404. A Preliminary JD, the simplest of JDs that relies on conservative assumptions about jurisdiction, for just one wash/wetland/etc. could cost over \$15,000 if a site visit is needed. Even without a site visit, such a JD would cost almost \$8,000. To then move forward with a general permit would cost at least an additional \$9,000, making the minimum cost to permit one waterbody over \$16,000. This is in addition to hiring an expert to help them prepare the documentation necessary to submit to ADEQ because ADEQ does not appear to be planning to offer free assistance to provide that documentation as part of program assumption. What currently costs an individual landowner \$0 under the USACE program (including outside expert costs because the USACE will prepare much of this in-house for those who can't afford expert help), will now cost them tens of thousands of dollars. If an individual permit is needed, that landowner could expect to pay a minimum of \$87,000 versus \$100 to the USACE. For many small businesses and landowners, this will be utterly out of reach. Such burdensome fees would result either in an increase in non-compliance (i.e., unpermitted dredge and fill activities) which would impact water and environmental quality in the State, or the fees would result in an economic opportunity cost unequally impacting applicants with smaller operations. This is a serious concern to Phoenix. We do not think imposition of these fees is a net benefit to these parties, the City, or the State of Arizona from either an economic or environmental quality perspective.

3) In addition, the proposed fees do not appear to be reflective of actual work effort that would need to be expended by ADEQ in reviewing and approving these delineations and applications. In particular, for example, \$7875 for a single waterbody PJD is more than double what a consultant would charge Phoenix to prepare such a PJD including all the field work, mapping, analysis, and reporting needed to provide a complete submittal to the regulatory agency. For that amount, ADEQ staff would only need to review and approve/disapprove or adjust the completed submittals provided to them, which constitutes significantly less effort. An additional \$7500 for a single site visit is not reflective of the amount of staff time ADEQ would need in order to conduct such a visit, even if it was a full day effort. The fees appear to be established simply in order to provide the estimated \$2.5 million needed for ADEQ to support the overall program each year rather than the reasonable costs for the work associated with each of the proposed actions.

In short, the City of Phoenix does not believe the proposed ADEQ 404 program fee schedule would provide value to us as a permittee/applicant or to the small businesses and individual landowners in our community who would need 404 permitting. We do not recommend that ADEQ continue with the proposed assumption and believe the Section 404 program should remain with the Phoenix regulatory office of the USACE

**Survey Question #4: Selected "Yes"**

*Explanation:*

The City identified several gaps and other topics of concern in our prior letter dated May 22, 2019 providing comments on the final white papers. Several of the gaps identified in our prior letter appear to remain in the Roadmap. The City will provide details on these and other gaps and concerns/considerations identified during our review of the Roadmap in a detailed letter that will be sent to ADEQ separate from this survey. That letter will be sent prior to the November 17, 2019 deadline.